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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

CRIMINAL.

MARTIN FLETCHER LOWREY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United Statess

Your Petitioner, Martin Fletcher Lowrey, in support of his Petition for a Writ of Certiorari to reverse the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered April 28, 1947, affirming his conviction for removing and concealing untax-paid distilled spirits, Sections 2803 and 2913, Title 26, United States

Code Annotated, by the District Court for the Hot Springs Division of the Western District of Arkansas on September 20, 1946, respectfully shows:

A.

SUMMARY STATEMENT.

This action was initiated by the filing of an Indictment on June 4, 1946 in the United States District Court for the Western District of Arkansas. The Indictment charged this Petitioner with removing and concealing untax-paid distilled spirits. Your Petitioner was convicted of the crime as charged on September 17, 1946 before the Court (trial by Jury having been waived), and on September 20, 1946 was sentenced to three years imprisonment and fined One Thousand Dollars ($1,000.00).

The untax-paid distilled spirits were seized in the home of the Petitioner by Federal Officers conducting a search under a Search Warrant. The Petitioner in due course filed a Motion with the United States District Court for the Western District of Arkansas to quash the said Search Warrant and suppress the evidence obtained thereunder, setting up as his ground therefor that the Affidavit upon which the Search Warrant was predicated was void upon its face, and that the subsequent search of the Petitioner's private home was illegal. This Motion was overruled.

Petitioner in due time filed a Motion to Dismiss the two Counts of the Indictment, and as ground in support thereof stated that the said Counts did not charge venue with sufficient particularity to enable the Petitioner to plead former jeopardy. This Motion was overruled.

GOVERNMENT'S CONTENTION.

(A) The Government contended that the search of the Petitioner's home and the seizure of the untax-paid distilled spirits were made upon a valid Search Warrant predicated upon sufficient Affidavit.

(B) The Government contended that both Counts of the Indictment did sufficiently set out venue.

PETITIONER'S CONTENTION

(A) The Petitioner contends that the search of his private home by the Federal Officers under the authority of the said Search Warrant was unlawful and in violation of his rights as guaranteed to him by the Fourth Amendment to the Constitution of the United States; and in particular, that the Affidavit for the said Search Warrant, made by one of the Federal Officers, did not particularly describe the property to be searched for and seized, as required by the Fourth Amendment; and, therefore, that the Search Warrant which was predicated upon the said Affidavit was illegally issued and should have been quashed and the evidence obtained as a result of the said search suppressed.

(B) The Petitioner contends that the two Counts in the Indictment did not sufficiently state venue in order that the Petitioner could plead former jeopardy as guaranteed to him by the Sixth Amendment to the Constitution of the United States.

SUBSEQUENT PROCEEDINGS.

The Petitioner duly prosecuted an appeal from the judgment of the United States District Court for the Hot Springs Division of the Western District of Arkansas to the United States Circuit Court of Appeals for the Eighth Circuit, and on April 28, 1947, the said Eighth Circuit Court of Appeals handed down its opinion wherein it affirmed the conviction of the Petitioner. The Petitioner in due time filed a Motion for Stay of Mandate (R. p. 101-102), and states that the time allowed for the filing of this Petition for Writ of Certiorari has not expired.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1) Statutory Provision Believed to Sustain the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1945 [U. S. Code, Title 28, Section 347(a)].

(2) The Date of the Judgment to Be Reviewed.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming the conviction of the Petitioner, as heretofore stated, was entered on April 28, 1947. This Petition and Supporting Brief and Certified Record are filed within thirty days after final judgment.

(3) Statement of the Nature of the Case and the Rulings of the Circuit Court of Appeals Bringing This Case Within the Jurisdiction of This Court.

The nature of this case (a prosecution for removing and concealing untax-paid distilled spirits) has heretofore been stated. The Circuit Court of Appeals ruled (1) that the Affidavit for Search Warrant was sufficient and the subsequent search of the Petitioner's private home and the seizure of the said untax-paid distilled spirits were valid; and (2) that both Counts of the said Indictment sufficiently stated venue. Each of such rulings is reviewable by this Court under the appropriate statutory provisions noted.

(4) Cases Believed to Sustain the Jurisdiction of This Court.

This Court is vested with jurisdiction under the statutory provisions heretofore specified, and the authorities submitted by Petitioner as a basis for the exercise of such jurisdiction to review the judgment below are cited hereafter in connection with Petitioner's reasons for allowance for the Writ of Certiorari. (See Paragraph E.)

C.

THE QUESTIONS PRESENTED.

(1) Did the Affidavit for Search Warrant upon which the Warrant itself was predicated and issued meet the requirements of the Fourth Amendment to the Constitution of the United States? (R. p. 7 & 8)

(2) Does Rule 41(c) of the Federal Rules of Criminal Procedure, effective March 21, 1946 (18 U. S. C. A., page 276 of Pocket Supplement following Section 840), set forth the requirements of an Affidavit for a Search Warrant, and if so, does it supersede the Fourth Amendment to the Constitution of the United States?

(3) Did both Counts of the Indictment state venue with sufficient particularity to enable the Petitioner to plead former jeopardy? (R. p. 8 & 9)

D.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) This Case Presents Important Questions of Federal Constitutional Law Which Have Not Been, But Should Be, Settled by This Court.

(a) The first point involves the Fourth Amendment to the Constitution of the United States, which heretofore has never been directly passed upon by this Court, to-wit: Is it necessary that an Affidavit for a Search Warrant describe with particularity the property to be searched for and seized? This is a point of particular importance and involves the sanctity of one's private home against unlawful searches. This question is of material importance to the public, to the Judiciary, to the Bar generally, and to all Federal Enforcement Officers.

(b) This point involves, for the first time in this Court, a construction to be placed upon Rule 41(c) of the Federal Rules of Criminal Procedure (supra); that is, whether the said Rule sets forth the requirements and contents of a Search Warrant, or whether the said Rule sets forth the

requirements and contents of an Affidavit for a Search Warrant. If the said Rule sets forth the requirements for an Affidavit for Search Warrant, then is it not in direct conflict with the Fourth Amendment to the Constitution of the United States? This question should be settled by this Court.

(c) Is Rule 7(c) of the Federal Rules of Criminal Procedure, effective March 21, 1946 (18 U. S. C. A., page 216 of the Pocket Supplement following section 840) in conflict with the Sixth Amendment to the Constitution of the United States, and would a form of Indictment as approved in the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case at Bar (R. p. 99) be sufficient to enable a Defendant to plead former jeopardy, and did both Counts of the said Indictment (R. p. 8 & 9) against this Petitioner sufficiently state venue with such particularity, under the Sixth Amendment to the Constitution of the United States, to enable the Petitioner to plead former jeopardy?

E.

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION IN A WAY THAT IS UNTENABLE AGAINST THE WEIGHT OF AUTHORITY, AND IN CONFLICT WITH APPLICABLE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The Eighth Circuit Court of Appeals in the case at Bar (which case is unreported to date) construed the Fourth Amendment to the Constitution of the United States, the material parts of which Amendment are quoted as follows:

> "* * * No warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

to mean that the only requirement for an Affidavit for a Search Warrant was the setting out of probable cause for the issuance thereof, and that it was not necessary that a

particular description of the person or things to be seized be set out therein.

The Eighth Circuit Court of Appeals in its opinion followed the case of U. S. vs. Wroblewski (7th Circuit), 105 Fed. (2nd) 444-446. There is no other decision by any other Circuit Court of Appeals in harmony with the above, and several of the other Circuit Courts of Appeals have held to the contrary, some of which decisions are as follows, to-wit:

Weinberg vs. U. S., 126 Fed. (2nd) 1004 (2nd Circuit);

Hawker vs. Queck, 1 Fed. (2nd) 77 (3rd Circuit);

Wood vs. U. S., 279 Fed. 706 (4th Circuit);

Paper vs. U. S., 53 Fed. (2nd) 184 (4th Circuit);

U. S. vs. Old Dominion Warehouse, 10 Fed. (2nd) 736 (2nd Circuit)—see concurring opinion by Judge Hough.

These decisions will be discussed briefly in the Petitioner's Supporting Brief.

CONCLUSION AND PRAYER.

Each of the questions presented is of primary importance and raises for the first time in this Court a construction of the Fourth Amendment to the Constitution of the United States, and a construction for the first time of Rules 41(c) (supra) and 7(c) (supra) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

These questions are a matter of importance to the public, to the Judiciary, to the Bar generally, and to all Federal Enforcement Officers.

Wherefore, Petitioner prays that this Court issue its writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the Record and all proceedings in the case numbered and entitled on its docket as number 13,444 (Criminal), Martin Fletcher Lowrey, Appellant,

vs. United States of America, Appellee; and that said Judgment of the said United States Circuit Court of Appeals for the Eighth Circuit may be reviewed by this Court, and that this Petitioner have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

C. FLOYD HUFF, JR.,
Hot Springs, Arkansas,

and

DREW BOWERS,
Little Rock, Arkansas,

Attorneys for the Petitioner.

VERIFICATION.

State of Arkansas,
County of Garland.—ss.:

Martin Fletcher Lowrey, being duly sworn, deposes and says:

That he is the Petitioner in the within action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes them to be true.

MARTIN FLETCHER LOWREY,
Petitioner.

Subscribed and sworn to before me, the undersigned, a Notary Public, duly commissioned and acting, within and for the State and County aforesaid, this 10th day of May 1947.

(Seal)

ANNETTE WRIGHT,
Notary Public.

My Commission Expires: September 3, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

CRIMINAL.

MARTIN FLETCHER LOWREY, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITIONER'S BRIEF.

FACTS.

On September 17, 1946, Petitioner was convicted in the United States District Court for the Hot Springs Division of the Western District of Arkansas upon an Indictment containing two Counts, the first of which charged the Petitioner with the possession of untax-paid distilled spirits, upon the immediate containers of which the proper Internal Revenue Stamps denoting payment of tax had not been affixed, and the second Count charged the concealment by the Petitioner of untax-paid distilled spirits upon which

proper tax had not been paid and which had theretofore been removed from some distillery unknown to a place other than a bonded distillery warehouse, to-wit: to the residence of the Petitioner.

On September 20, 1946, Petitioner was sentenced upon the Indictment as a whole to a prison term of three years, and fined the sum of One Thousand Dollars ($1,000.00) on the Indictment as a whole.

The judgment of conviction and sentence were appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment of the United States District Court was unanimously affirmed on the 28th day of April, 1947 in an opinion written by the Honorable Judge Johnsen.

As heretofore stated in the Petition for Writ of Certiorari, the evidence upon which the Petitioner was convicted was obtained as a result of a search of his private home by Federal Officers under authority of a Search Warrant, the Affidavit for which Search Warrant, the Petitioner charges, did not meet the requirements of the Fourth Amendment to the Constitution of the United States, in that the said Affidavit for Search Warrant did not describe with particularity the property to be searched for and seized. (R. pp. 7 and 8)

This application is made to obtain a review of the decision of the said United States Circuit Court of Appeals for the Eighth Circuit.

The primary questions presented may be condensed to three points, as follows:

1. That reversible error was committed by the Trial Court in its interpretation of the Fourth Amendment to the Constitution of the United States, and in overruling the Petitioner's Motion to quash Search Warrant and suppress the evidence obtained thereunder; and likewise, the United States Circuit Court of Appeals for the Eighth Circuit committed a reversible error in affirming the judgment of the Trial Court; and that the rulings of both the Trial Court and the Circuit Court of Appeals are contrary

to decisions of other Circuit Courts of Appeals and placed an erroneous interpretation upon the Fourth Amendment to the Constitution of the United States.

2. That both the Trial Court and the Circuit Court of Appeals placed in erroneous interpretation upon Rule 41(c) of the Federal Rules of Criminal Procedure, effective March 21, 1946 (18 U. S. C. A., page 276 of the Pocket Supplement following Section 840), by construing the said Rule as applying to Affidavits for Search Warrants.

An interpretation has never before been placed upon this said Rule by any Circuit Court of Appeals other than by the Eighth Circuit Court of Appeals in the case at Bar, and has never been passed upon by this Court.

It is the contention of petitioner that Rule 41(c) (supra) deals entirely with the contents of a Search Warrant and has no application to the Affidavit for Search Warrant.

3. That both the Trial Court and the Circuit Court of Appeals placed an erroneous interpretation upon Rule 7(c) of the Federal Rules of Criminal Procedure, effective March 21, 1946 (18 U. S. C. A., page 216 of the Pocket Supplement following Section 840), by holding that under the said Rule the Indictment sufficiently stated venue.

It is the contention of the Petitioner that the said Rule is in direct conflict with the Sixth Amendment to the Constitution of the United States, and which Rule has never been interpreted by any Circuit Court of Appeals, other than by the Eighth Circuit Court of Appeals in the case at Bar, and, therefore, has never been interpreted by this Court.

Rule 7(c) (supra) deals with the contents of an information or Indictment, and the question presented is whether or not Rule 7(c) (supra) is in conflict with the Sixth Amendment to the Constitution of the United States; and as applied to the case at Bar, whether or not the Indictment sufficiently set forth venue whereby the Petitioner could plead former jeopardy.

POINT I.

Reversible error was committed in the construction placed upon the Fourth Amendment to the Constitution of the United States.

The Fourth Amendment (U. S. C. A., Constitution, Amendments 1 to 13, page 29) is quoted, as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Circuit Court of Appeals in its opinion (R. p. 90-96 incl.) held in effect that the words, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation", were all that was necessary to set out in an Affidavit for Search Warrant, and that the following words, "and particularly describing the place to be searched, and the persons or things to be seized", need not be set out in the Affidavit for Search Warrant, but were applicable only to the Warrant itself. This construction is in direct conflict with the following cases of other Circuit Courts of Appeals, to-wit:

Weinberg v. U. S., 126 Fed. (2nd) 1004, Headnotes 5 and 6 (Second Circuit), the material parts of which opinion read as follows:

> "To make a search in the Southern District of New York, it is necessary to obtain a warrant from the proper official having authority there, upon probable cause, supported by Affidavit, naming or describing the property and the place to be searched, and the Warrant itself must state the probable cause for its issue and the name of the persons whose affidavits were taken in support of it and particularly describing the place to be searched and the person or thing to be seized. Amendment 4."

The Court, in Wood v. U. S., 279 Fed. 706 (Fourth Circuit), in construing the point involved, stated as follows:

> "Affidavit must state property to be seized under warrant. An affidavit for a warrant for search of property held in fraud of the revenue of the United States which is substantially in the language of Revised Statute No. 3462, authorizing search warrants, but which does not particularly describe the person or thing to be seized does not conform to the requirements of the Constitution, Amendment 4, and a warrant issued thereon in following its language is void."

In Hawker v. Queck, 1 Fed. (2nd) 77 (Third Circuit), Headnote 1, the Court is quoted as follows:

> "It is particularly describing the place to be searched and the person or things to be seized which the Constitution requires should be evidenced by affidavit, and when the Affidavit measures up to this Constitutional requirement then a warrant may lawfully issue."

There are several other decisions to the same effect which we do not deem necessary to cite herein, as we have cited opinions from three Circuits in conflict with the opinion in the case at Bar.

From the opinion of the Eighth Circuit Court of Appeals in the case at Bar, it would not be necessary, from its interpretation of the Fourth Amendment, even to set out a description in the Affidavit of the premises to be searched, as that Court in its opinion held that that part of the Fourth Amendment which reads "and particularly describing the place to be searched, and the persons or things to be seized" is not applicable to an Affidavit for Search Warrant. If that interpretation is correct, then how would the United States Commissioner, or other issuing authority, know what description to set forth in the Warrant itself of the premises to be searched unless such a description were set out in the Affidavit? It is well settled law that a Warrant cannot go outside the Affidavit.

If it is necessary to set out in the Affidavit the description of the premises to be searched, then likewise it is

necessary to set out in the Affidavit the particular description of the person or things to be searched for and seized, because in the Fourth Amendment the words, "and the persons or things to be seized", follow the words, "and particularly describing the place to be searched".

As heretofore stated, this Point I has never been passed upon by this Court.

POINT II.

The Circuit Court of Appeals committed a reversible error in its construction of Rule 41(c) of the Federal Rules of Criminal Procedure (supra).

This Point, likewise, has never been construed by any Circuit Court of Appeals, other than by the Eighth Circuit Court of Appeals in the case at Bar, nor by this Court.

The Eighth Circuit Court of Appeals in its opinion (R. p. 94) held that this Rule supercedes the Espionage Act of June 15, 1917 (Sec. 611 to Sec. 633, 18 U. S. C. A.). Section 613 of Title 18 U. S. C. A. clearly recites that the description of the property to be searched for and seized must be described with particularity in the Affidavit

Section 616 of Title 18 U. S. C. A. sets forth the requirements for the Search Warrant itself.

It is the contention of the Petitioner that Rule 41(c) (supra) deals only with the Search Warrant itself, and that the said Rule does not supersede Section 613 (supra); otherwise, it would be in conflict with the Fourth Amendment.

POINT III.

The Circuit Court of Appeals committed a reversible error in its construction of Rule 7(c) of the Federal Rules of Criminal Procedure (supra).

The Circuit Court of Appeals held that under Rule 7(c) (supra), in both Counts of the Indictment, venue was sufficiently set out.

The applicable part of Rule 7(c) (supra) reads as follows:

> "NATURE AND CONTENTS. The Indictment or the Information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

It is the contention of the Petitioner that this Rule does not change or supersede existing law. If it did do so, it would be in direct conflict with the Sixth Amendment to the Constitution of the United States (U.S.C.A., Constitution, Amendments 1 to 13, page 327).

The Circuit Court of Appeals for the Eighth Circuit, in its opinion (R. p. 99), cites the various cases relied upon in the said Circuit Court of Appeals by this Petitioner in support of this point, and held that the said cases so cited were the law prior to the adoption of Rule 7(c), and that this Rule supersedes such law.

This point likewise has never been decided by any Circuit Court of Appeals, other than by the Eighth Circuit Court of Appeals in the case at Bar, nor by this Court.

POINT IV.

CONCLUSION.

It is respectfully submitted that the learned Circuit Court of Appeals for the Eighth Circuit erred; that the principles asserted by the learned Circuit Court of Appeals in upholding the conviction of this Petitioner are contrary to the Fourth Amendment to the Constitution of the United States, to established law, and to the Sixth Amendment to the Constitution of the United States, and are in conflict

with decisions of other Circuit Courts of Appeals, and are an improper construction of the Federal Rules of Criminal Procedure concerned herein, and merit review by this Court.

Respectfully submitted,

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and

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Attorneys for Petitioner.